No. 12956

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE W. MOSELEY,

Appellant,

vs.

LAWRENCE C. MOSELEY, EDWARD S. FRANZUS, SANITEK PRODUCTS, INC., a corporation, and 111 SOUTH GAREY CORPORATION, a corporation,

Appellees.

APPELLEES' BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

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APPELLEES' BRIEF.

Jurisdiction.

Appellees hereby refer to the statement of Jurisdiction beginning on page 1 of Appellant's Opening Brief in this case, and by this reference incorporate the said statement of Jurisdiction herein as though it were fully set out herein.

Statement of the Case.

This is an action by the Plaintiff, Clarence W. Moseley, for an accounting, for breach of trust, for reformation of contract and for general relief, based upon a contract which Plaintiff had with his brother, Lawrence C. Moseley, one of the members of a partnership known as Sanitek Products Co., consisting of said Lawrence C. Moseley and

Edward S. Franzus. Said partnership was dissolved several years after the execution of said contract, but prior to the within action. Plaintiff concedes that at no time was he a member of such partnership. The trial court concluded that the said contract was free from ambiguity and was not entered into under mistake of fact or of law, and denied reformation thereof and held that plaintiff's rights were controlled and governed by its provisions; and that the said contract had been properly and lawfully terminated on October 31, 1947, on which date said partnership known as Sanitek Products Co., had been dissolved by its two sole members; and ordered that an accounting should be accorded plaintiff as of said date of October 31, 1947. Upon such accounting it was determined by the trial court that plaintiff was entitled to the sum of $26,150.70, and accordingly it rendered judgment in favor of plaintiff and against the defendant, Lawrence, in the said sum, without interest, plus costs of suit of $23.48, and dismissed the remaining defendants from the case.

The trial court found that the defendant, Lawrence, at all times was willing to fully account to plaintiff and pay to plaintiff any sums found due on said accounting; and that the amount of the judgment herein granted was at all times unliquidated until the trial of this action. Defendant, Lawrence, by a deposit with the trial court of said amount of $26,150.70, has made said amount available to the plaintiff in full payment and satisfaction of said judgment. Plaintiff has refused to accept said amount and has taken this appeal from the judgment.

Clarence W. Moseley, Plaintiff and Appellant herein, is sometimes referred to herein as "Clarence" or "Plaintiff"; Lawrence C. Moseley, Defendant and Appellee, is sometimes referred to herein as "Lawrence" or "Defendant";

Defendant and Appellee, Edward S. Franzus, is sometimes referred to herein as "Franzus."

On or about April 1, 1941, Lawrence and Clarence, twin-brothers, purchased certain stock of the Gerson-Stewart Pacific Corporation for the sum of $4,000.00, one-half thereof being paid by each. On or about May 1, 1943, Lawrence and Clarence purchased additional stock of said Gerson-Stewart Pacific Corporation for the sum of $4,-500.00, one-half thereof being paid by each. The Gerson-Stewart Pacific Corporation was engaged in the business of manufacturing, jobbing and selling soaps and sanitation chemicals, with its principal place of business in Los Angeles, California. On or about September 15, 1943, the said Gerson-Stewart Pacific Corporation was dissolved and its assets distributed to and its business continued by Lawrence and Franzus, as co-partners, under the firm name and style of Sanitek Products Company, with their principal place of business at 111 South Garey Street, Los Angeles, California. Franzus and Lawrence were equal partners in the said Sanitek Products Company, each holding a fifty-percent (50%) share in the business and assets thereof and sharing in the profits and losses thereof equally. One-half of the total consideration by which Lawrence's fifty percent (50%) share was acquired in the said partnership composed of himself and Franzus, had been contributed by Clarence. The other half was contributed by Lawrence. [Tr. pp. 16, 17 and 18.]

On or about August 31, 1945, a written contract [Tr. pp. 16 to 20] was entered into between Clarence and Lawrence at Los Angeles, California, which contract, at the request of the brothers, was prepared by Mr. Curry of the law firm of Williamson, Hoge and Curry, attorneys for Appellant, Clarence, in this case. Under this con-

tract provision was made for a division of earnings between the brothers from the one-half interest held by Lawrence in the Lawrence-Franzus partnership, on a basis of 75% to Lawrence and 25% to Clarence; and the sharing of the capital interest on a fifty-fifty basis; and it was provided, among other things,

> ". . . any such earnings attributable to such share or interest which shall be retained by the partnership shall belong to Lawrence C. Moseley and Clarence W. Moseley in the foregoing ratio, that is, seventy-five percent (75%) to Lawrence C. Moseley and twenty-five percent (25%) to Clarence W. Moseley, and upon any dissolution, liquidation, or other termination of the partnership, the interest of the parties hereto shall be adjusted accordingly,"

and that

> "5. Lawrence C. Moseley shall have the sole right to represent said partnership interest and to make all decisions and take all action in respect thereto, and, subject to the obligation to account to Clarence W. Moseley, as aforesaid, shall have all rights and powers with respect to said partnership interest which he would have were said interest his own property, free of these trusts."

There was no provision in said contract between Clarence and Lawrence with respect to how long it would continue. Thus, Lawrence was given general power to deal with the interest of himself and his brother as though it were his own property, free of any trust obligation, except to

account to Clarence upon liquidation or termination to the extent of one-half of the capital interest, and except to pay to Clarence twenty-five percent (25%) of earnings if any accrued prior to termination.

Lawrence devoted his full time and attention to the business and affairs of the partnership composed of himself and Franzus. Clarence was not a member of the partnership composed of Lawrence and Franzus and contributed no services in its business and did not assume any liabilities thereof. Clarence contributed the sum of $4,-250.00 to Lawrence to be used in the partnership composed of Lawrence and Franzus. Lawrence has previously paid to Clarence on this investment of $4,250.00, the sum of approximately $25,000.00; approximately $20,000.00 being paid prior to the time of the termination, on October 31, 1947, of the contract of August 31, 1945, between Lawrence and Clarence, and $5,000.00 on November 12, 1947. [Tr. p. 65.]

As of October 31, 1947, the said partnership, Sanitek Products Company, between Lawrence and Franzus, was dissolved by mutual consent of said partners; the business and assets of said partnership, with the exceptions hereinafter noted, were transferred as of said date, October 31, 1947, to Sanitek Products, Inc., a California corporation, one of the defendants originally named in this action but dismissed from the case. In consideration of the transfer, said corporation issued certain shares of its capital stock in equal amounts to the partners, Lawrence and Franzus; said corporation assumed all liabilities of the business ap-

pearing on the books of the partnership at said date; and said corporation continued to carry on the business theretofore carried on by said partnership. [Tr. p. 28.]

Upon the dissolution of said partnership, the real estate, upon which is located the plant and offices of said business, was transferred to the 111 South Garey Corporation, a California corporation, one of the defendants originally named in this action, but dismissed from the case. A lease of said premises was made by 111 South Garey Corporation to Sanitek Products, Inc., and the business continued to be conducted upon and from said premises. Certain cash and the proceeds of accounts receivables, when collected, were distributed in equal shares to Lawrence and Franzus. [Tr. pp. 28-29.]

The defendant, Lawrence, at all times was willing to fully account to plaintiff and pay to plaintiff any sums found due on said accounting. The amount of the judgment herein granted was at all times unliquidated until the trial of the action. [Tr. pp. 28-30.]

Franzus, formerly a defendant herein, but dismissed from the case, had no knowledge of the existence of the written contract of the brothers, dated August 31, 1945, but knew that the plaintiff, Clarence, had an interest in the one-half share of the defendant, Lawrence. Franzus did not conspire with the defendant, Lawrence, for the purpose of depriving the plaintiff of his interest in the one-half share of the defendant, Lawrence, or preventing the plaintiff from sharing in distributions made to Lawrence from said partnership, or otherwise. [Tr. pp. 30-31.]

Questions Involved and How They Arise.

Appellees' position is that upon the dissolution of the said partnership between Lawrence and Franzus, on October 31, 1947, the contract of August 31, 1945, between Clarence and Lawrence terminated; and that in accordance with said contract the plaintiff has only the right to be paid by Lawrence the value of plaintiff's interest in Lawrence's 50% share in said Sanitek Products Company as of October 31, 1947, as determined by the trial court, to wit, the sum of $25,400.70, plus the amount owed to Clarence by Lawrence for earnings for the period prior to October 31, 1947, to wit, $750.00; making a total of $26,150.70; and that Lawrence had express authority, right and privilege, by the terms of the contract entered into between himself and his brother, dated August 31, 1945, to dissolve the partnership between Lawrence and Franzus at any time and mutually agree with Franzus to a transference of its assets; and that when such dissolution was effected between Lawrence and Franzus on October 31, 1947, it terminated all rights of Clarence under the contract of August 31, 1945, to the further services of his brother, Lawrence, in his behalf; and it terminated all except the right to an accounting of earnings and capital investment and increment up to said date of October 31, 1947; that Clarence's prayer for an accounting from Lawrence for all distributions paid to Lawrence from the assets and earnings of the business for any period of time *after* October 31, 1947, was properly denied by the trial court and that the plaintiff, Clarence, has no right to pur-

sue any funds or properties of the two new corporations, or to require of Lawrence any accounting for any funds or properties received by Lawrence from the corporations after the date of October 31, 1947; that plaintiff, Clarence, is entitled to the balance due on an accounting for his part of such earnings and capital as had accrued up to and including October 31, 1947, and is entitled to no other right. This position was sustained by the trial court. [Tr. pp. 33-34.]

The Plaintiff, Clarence, through his counsel, on page 6 of Appellant's Opening Brief, concedes, and concurs with the trial court's conclusion that when the partnership between Lawrence and Franzus was dissolved, the contract of August 31, 1945, between Clarence and Lawrence likewise terminated. However, Clarence contends, in effect, that notwithstanding the termination of said contract of August 31, 1945, and the dissolution of the partnership between Lawrence and Franzus, that the interest of Clarence provided for in said contract of August 31, 1945, should continue unless and until there is a formal, judicial winding-up of the dissolved partnership between *Lawrence and Franzus.*

ARGUMENT.

I.

Upon the Dissolution of the Lawrence-Franzus Partnership, the Contract of August 31, 1945, Between the Plaintiff, Clarence, and the Defendant, Lawrence, Terminated, and Plaintiff, Clarence, Had Only the Right After an Accounting From Lawrence, to Be Paid the Value of His Interest in the Half Share of Lawrence in the Lawrence-Franzus Partnership, as of October 31, 1947, the Date of Its Dissolution.

At the outset it would be well to consider the rights, duties and obligations of the brothers under their contract of August 31, 1945 [Tr. pp. 16-20], because this, in our opinion will resolve the main question on this appeal.

A careful reading of this contract discloses that Lawrence was given the sole right to deal with the interest of Clarence and Lawrence in the Lawrence-Franzus partnership and to make all decisions and take all action in respect thereto, free of any control whatsoever by Clarence, and was granted all rights and powers with respect to said interest which he would have were the interest his own property free of the contract with Clarence, but subject only to the obligation on the part of Lawrence to account to Clarence. This is a fair and reasonable interpretation of Paragraph 5 of the contract and was adopted by the trial court in the court below. [Tr. pp. 33-34.] Paragraph 5 of said contract is as follows:

> "5. It is mutually agreed that Lawrence C. Moseley shall have the sole right to represent said partnership interest and to make all decisions and take all action in respect thereto, and subject to the obliga-

tion to account to Clarence W. Moseley, as aforesaid, shall have all rights and powers with respect to said partnership interest which he would have were said interest his own property free of these trusts."

The contract of the brothers clearly contemplates the *possibility that the partnership between Lawrence and Franzus might be dissolved, liquidated or terminated* and the contract of the brothers makes provision in the event of that happening. This is a fair and reasonable interpretation of the applicable portion of Paragraph 3 of the contract and was adopted by the trial court in the court below. [Tr. pp. 33-34.] That portion of paragraph 3 of said contract is as follows:

> "3. . . . and upon any dissolution, liquidation, or other termination of the partnership the interests of the parties hereto shall be adjusted accordingly."

Clearly, the provisions of paragraph 5 of the brothers' contract empowered Lawrence to mutually agree with Franzus to a dissolution of the Lawrence-Franzus partnership and the transference of its assets; and the provisions of paragraph 3 of the brothers' contract show that the brothers contemplated the possibility of dissolution of the Lawrence-Franzus partnership and the transference or liquidation of its assets.

In view of the express rights granted Lawrence by this contract we fail to see how it can be seriously urged by the plaintiff that Lawrence was guilty of a breach of trust. The trial court construed and interpreted this contract as empowering and authorizing the action taken by Lawrence and refused to hold him guilty of any breach of trust. [Tr. pp. 28-33.]

The Clarence-Lawrence contract did not prohibit Lawrence from agreeing with his partner, Franzus, to a dissolution of the Lawrence-Franzus partnership; it did not limit Lawrence as to the manner, price or terms under which such a dissolution and transference of assets could take place; instead, it gave Lawrence the right and privilege to treat with the interest of Clarence and Lawrence in the said Lawrence-Franzus partnership in every way as though said interest were the sole property of Lawrence, free of any trust obligation to Clarence, except only the duty of Lawrence to account to Clarence.

The said Clarence-Lawrence contract did not contain any requirement that Lawrence should obtain a judicial winding-up in the event of a dissolution or termination of the Lawrence-Franzus partnership, nor did the Clarence-Lawrence contract require that in event of the dissolution of the Lawrence-Franzus partnership, that the assets of said partnership should be sold at public sale.

The law does not require partners to necessarily obtain a judicial winding-up upon termination of a partnership. They may dissolve and wind up the partnership affairs informally by agreement between themselves, as was done here. (20 Cal. Jur., page 819, section 115; *Cayton v. Walker,* 10 Cal. 450, 455 (1858).) Clarence was not a member of the partnership of Lawrence and Franzus and had no right to control the manner of its dissolution or winding-up. Nor did he make any reservation in his agreement with his brother, Lawrence, that his brother, Lawrence, should insist upon any specific procedure in the event of dissolution or termination of the Lawrence-Franzus partnership. There is no claim in the pleadings that Lawrence at any time attempted to cheat or defraud his brother, Clarence, as to the value of the interest of Law-

rence and Clarence as of the date of October 31, 1947. At all times Lawrence was ready, willing and able to have the value of that interest appraised, determined, and to account therefor to his brother, Clarence, and also to account to his brother Clarence, for the share of the earnings accrued up to and including the said October 31, 1947. As conceded by plaintiff's counsel on page 5 of their Opening Brief, and as to which they raise no question herein, the trial court received evidence, including stipulations of the parties, with respect to the value of Clarence's interest in the one-half share of Lawrence in the Lawrence-Franzus partnership and based upon the evidence before it, judicially determined the value of Clarence's interest as of the date of October 31, 1947, and granted Clarence a judgment predicated thereon. It cannot be urged, therefore, that a mere outsider's idea of the value of Clarence's interest was forced to be accepted by Clarence, but rather the independent judgment of the trial court, upon evidence adduced before it and the stipulations of the respective parties, form the basis for the judgment.

It is respectfully submitted that the contract of the brothers, even if viewed, for the sake of this discussion, as a contract of sub-partnership, would give no rights to Clarence to control the type of dissolution, *i.e.,* formal or informal, of the Lawrence-Franzus partnership, nor the form of the transference of the assets of the Franzus-Lawrence partnership. The contract of the brothers was subordinate and subject to the main partnership agreement existing between Lawrence and Franzus. Clearly, Clarence had no voice or right of control over the main partnership existing between Lawrence and Franzus, nor has Clarence the right to indirectly be heard or considered in the main partnership, through Lawrence. What-

ever Lawrence and his partner, Franzus, mutually decided as to the method of dissolution and winding-up of the Lawrence-Franzus partnership was the sole right of Lawrence and Franzus, in which decision Clarence had no right to participate. Clarence was a mere stranger to the partnership existing between Lawrence and Franzus and at no time was he, nor could he be considered, a partner in that firm.

The case of *Zeisler v. Steinman,* 53 N. Y. Super. 184 (1886), was a case wherein the facts were that the plaintiff had given money to his brother, the defendant, Zeisler, to be used as the latter's own money in the formation of a partnership with one, Steinman, and the money was given for such purpose upon the agreement that in consideration therefor, the plaintiff should have one-half of the profits of his brother. The Court held, at page 185:

> "This was an agreement to share in his brother's profits when ascertained and paid over, or at least set apart, by the firm of Steinman and Company. Upon this agreement he can maintain no action against the firm of Steinman and Company, because the firm as such was in no wise a party to it or affected by it." (Citing cases.)

In the case of *O'Conner v. Sherley,* 107 Ky. 70, 52 S. W. 1056 (1899), the Court held that an agreement between a partner and a stranger, to share the former's profits and losses of the original firm, does not make such stranger a partner in the original firm, though such agreement was made with the knowledge of the other partner of the original firm.

Assuming, for the sake of this discussion, that a trust relationship existed between Clarence and Lawrence, the

trust *res* being a 50 percent interest in the Franzus-Lawrence partnership business, when the Franzus-Lawrence partnership was dissolved the trust existing between the brothers terminated and the trustee's (Lawrence) sole remaining duty was to account to his brother, Clarence. In the case of *Knapp v. Knapp,* 15 Cal. 2d 237, 100 P. 2d 759 (1940), it was held:

> "But if the respondents were ever trustees for the benefit of the appellant, that relationship terminated when the trust property was sold."

In the present case, the purported trust agreement specifically contemplates the event, viz.: "dissolution, liquidation and or termination" of the Franzus-Lawrence partnership upon which the trust is to terminate, and defines the trustee's (Lawrence) duty to account in that circumstance.

> "The authority of a trustee to transfer trust property depends upon the terms of the instrument by which the trust is created."
>
> *Huntoon v. Southern Trust & Commerce Bank,* 107 Cal. App. 121 (1930), 290 Pac. 86, aff'd in 219 Cal. 93 (1933), 25 P. 2d 461.

A trust which provides for the event upon which it is to terminate, terminates automatically when the event occurs.

> *Exchange Bank v. Scholz,* 49 Cal. App. 2d 232, at 236 (1942), 121 P. 2d 526.

Even without specific provision, the plaintiff could not lawfully prevent termination of the Lawrence-Franzus partnership, since plaintiff was not a member of this partnership.

Corporations Code of California, Section 14018(g):

> "No person can become a member of a partnership without the consent of all the partners."

A partnership is terminable at any time by the will of one of the partners.

> *Corporations Code of California,* Sec. 15031(1)(b) and (2).

Corporations Code of California, Section 15025(2)(b):

> "A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property."

In short, the trust for plaintiff terminated with the termination of the trust *res,* viz., an interest in a partnership: Plaintiff could not lawfully prevent termination or claim wrongdoing because of termination of a partnership in which plaintiff was not a member; and plaintiff specifically recognized that fact by providing in his agreement with his brother for final accounting in the event of "dissolution, termination or other liquidation" of the partnership.

It follows that the transfer of partnership property incident to "dissolution, termination or other liquidation" of the partnership, was not a wrong to plaintiff; nor was the transferee thereof a wrongdoer; nor had plaintiff's brother any obligation to plaintiff beyond accounting in the manner provided in the agreement.

> *Huntoon v. Southern Trust & Commerce Bank, supra,* 107 Cal. App. 121, 290 Pac. 86 (1930), affirmed in 219 Cal. 93 (1933), 25 P. 2d 461.

II.

Plaintiff Was Not Entitled to Interest.

The amount owing to Clarence could not be ascertained until after an accounting was had; the amount therefore was unliquidated, and until ascertained no interest could be assessable against the defendant, Lawrence. A case in point is *Minton v. Mitchell,* 89 Cal. App. 361, at 372, and 373, 265 Pac. 271, at 276 (1928), wherein the Court held that where an accounting is necessary in order to determine the amount due, the demand is unliquidated and no interest may be recovered prior to judgment.

See to the same effect:

Roy v. Roy, 29 Cal. App. 2d 596, 605 (1938), 85 P. 2d 223.

Also:

In re Deming's Guardianship, 192 Wash. 190, at 229, 73 P. 2d 764, 782 (1937).

It will be remembered that the trial court, in the case at bar, expressly found that Lawrence at all times was willing to fully account to plaintiff and pay to plaintiff any sums found due on said accounting; and that the amount of the judgment herein granted was at all times unliquidated until the trial of the action. [Tr. pp. 28-30.]

In the present case the Plaintiff refused to accept an accounting upon the termination of the contract of the brothers and insisted, and still insists, instead on a con-

tinuing indefinite liability on the part of his brother, Lawrence, for an accounting and for profits from the date of October 31, 1947, forward. Under such circumstances Plaintiff is not entitled to interest, after his refusal of an accounting, since this would enable Plaintiff to benefit by his own improper demands.

> "No one can take advantage of his own wrong."
> *Civ. Code of California,* Sec. 3517.

> "He who seeks equity, should first do equity."
> *Faxon v. All Persons,* 166 Cal. 707, at 720 (1913), 137 Pac. 919.

The persistent refusal of Clarence to accept an accounting shows that it would have been an idle act for Lawrence to have tendered any particular sum of money by way of an accounting and therefore, no interest should run against Lawrence, since the law does not require a person to perform an idle act. (Civ. Code of California, Sec. 3532.) As the record shows [Tr. p. 21] Lawrence deposited the sum of $14,872.36 with the Clerk of the District Court, pursuant to an order of said court made on March 1, 1950, to abide the judgment of said court. This money was available to Clarence at any time he desired to accept the same but Clarence refused at all times to accept this amount, or the amount of the judgment ultimately rendered in his favor; and at the present time still refuses to accept the full amount of the judgment which has been on deposit with the Clerk of the District

Court in Los Angeles ever since the date of said judgment.

Failure to pay a debt that is due is excused when the payment thereof is prevented by the act of the creditor.

Rose v. Hecht, 94 Cal. App. 2d 662, 665 (1949), 211 P. 2d 347.

An offer of payment stops the running of interest on the obligation.

Civ. Code of California, Sec. 1504;

Rose v. Hecht (*supra*), at 665.

Once a tender, or offer of payment has been made, the law provides that such tender, or offer of payment, stops the running of interest on the obligation although there is no subsequent deposit of money to keep the tender good.

Wadleigh v. Phelps, 149 Cal. 627, at 642 (1906), 87 Pac. 93;

Civ. Code of California, Sec. 1504.

III.

Plaintiff Has No Claim Against Franzus or the Corporations and They Were Properly Dismissed by the Court From the Case.

As we have pointed out in this brief, the contract of the brothers contemplates transfer or sale of the Lawrence-Franzus partnership business and clothed Lawrence with unlimited powers to deal with his half-share interest in the Lawrence-Franzus partnership property as his own, free from trust obligations, except the narrow, limited obligation to pay over and account for the amount due Plaintiff, when, as, and if a termination and dissolution of the Lawrence-Franzus partnership should occur.

In view of the above, clearly Franzus and the corporations are not liable to Clarence in any manner whatever. A case in point is *Huntoon v. Southern Trust & Commerce Bank,* 107 Cal. App. 121 (1930), affirmed 219 Cal. 93 (1933). In that case the heirs of decedent trustor sued the trustee Bank and third party purchasers to recover land deeded by the decedent during his lifetime in trust with the power "to sell and convey the property herein described." Plaintiff complained that the trustee sold after the death of the trustor, and after an unreasonable lapse of time. In sustaining judgment upon demurrers granted without leave to amend, the Court stated:

> "It is argued that notice of a trust will be imputed to a purchaser when there is a declaration or recital in the trust deed, either asserting the existence of the trust or serving to put a man of common prudence upon inquiry, and that this is constructive notice of everything to which such inquiry would presumably lead. . . . But while the instrument here involved designates the Southern Trust and Commerce Bank as trustee, it expressly gives such trus-

tee power to sell and convey the real property in question. Under such circumstances, the reasons which lie behind the rule referred to, cease to exist. The grantor having expressly clothed the trustee with not only the legal title, but the power to sell and convey, and a vendee being thus notified that the trustee has this power of conveyance, we think the purchaser from such a trustee is not charged with notice as to any other conditions of the trust, and that a deed from such a trustee will convey title in the real property conveyed, free from any claim of the trustor or beneficiaries of the trust. The authority of a trustee to transfer trust property depends upon the terms of the instrument by which the trust is created. Where a trustee is expressly empowered to sell, his deed vests title in the purchaser."

In fact, where a trustee is empowered to sell or transfer, the purchaser will be protected although the sale be made in violation of the trustee's duty to the beneficiary.

Huntoon v. Southern Trust & Commerce Bank (*supra*), at p. 127;

Thompson v. McKay, 41 Cal. 221, at 231 (1871).

The case for Franzus and the corporations is even stronger where, as here, plaintiff had no interest in the co-partnership of Lawrence and Franzus, that is to say, in the property which was transferred and distributed, but instead was entitled merely to a provisional, percentage interest in the value accrued to one partner upon the "dissolution, liquidation or other termination of the partnership."

The record shows that Franzus had no knowledge of the existence of the contract of the brothers, but in view of the above, it would make no difference if he had such knowledge.

IV.

The Authorities Relied Upon by Plaintiff Are Not Applicable to the Facts of This Case.

We have no quarrel with the principles of law enunciated by the cases and authorities cited by Plaintiff's counsel in their opening brief. Our contention is, however, that they do not apply to the facts of this case. It should be borne in mind that in the case at bar there is a contract between the brothers fixing and settling their rights, duties and obligations. Statements of the law and from texts of general principles of law are not controlling as against the express terms of a valid contract between the parties establishing their rights and duties.

All of the contentions raised by the plaintiff are readily distinguished when it is considered that Clarence was not a member of the Lawrence-Franzus partnership and when it is considered that Clarence, by express provision, gave his brother, Lawrence, the right to treat with the property as his own, free of any trust obligation and free of all obligation except the duty to account in the event of termination or dissolution of the Lawrence-Franzus partnership. The bulk of the cases cited by Plaintiff involve full partnership and trust arrangements without the broad powers of the one party and the narrow rights of the other which are contained in the instant contract.

Plaintiff's counsel assert that there should have been a judicial winding-up of the Lawrence-Franzus partner-

ship. Merely because a partnership may be judicially wound up does not mean that it cannot be informally wound up, as was done in the case at bar. Plaintiff's counsel has cited no authority which demands that there be a judicial winding-up of a partnership. In fact, as is well known, the more commonly used method is the informal method rather than the formal or court method. In any event, the plaintiff in effect obtained the benefits of a judicial winding up when the trial court ordered an accounting and took evidence of the value of the interest of Clarence as of the date of October 31, 1947. It should be noted that Clarence does not complain that the trial court's finding on such value was unreasonable. In fact, he does not question such finding.

It must be apparent that the real objective of Clarence in this case is to perpetuate his former interest in the Lawrence-Franzus partnership for an indefinite period of time and to accomplish a reformation of the contract between Lawrence and Clarence; and to do that which the trial court expressly refused to allow, to wit: to reform the contract so as to have it continue for an indefinite period of time in the future. The contention of plaintiff's counsel that the contract rights of Clarence should continue until there has been a judicial winding up of the Lawrence-Franzus partnership is but another way of stating that the plaintiff desires indefinite continuation of obligation on the part of Lawrence.

Conclusion.

In summary, we respectfully submit that the rights of the parties to this action are to be measured by the terms of the contract of August 31, 1945; that this contract is clear and unambiguous, and that under this contract Lawrence was given the broad right by plaintiff to treat with the interest of plaintiff as though it were the property of Lawrence, free from any trust obligation, except only for the obligation of Lawrence to account to the plaintiff for one-half of the proceeds of the capital interest of Lawrence in the event of liquidation, dissolution or termination of the Lawrence-Franzus partnership, and except that with reference to earnings made prior to such liquidation, dissolution or termination, to pay to plaintiff twenty-five per cent (25%) of the earnings, if any, of that partnership, and to account for said percentage of earnings, if unpaid, after such liquidation, dissolution or termination.

The contract contemplates the possibility of liquidation, dissolution and termination; and since it contains no specific term, such liquidation, dissolution and termination was left to the sole discretion of Lawrence, who, as noted above, was given the broad right to treat with the interest of himself and his brother as though it were Lawrence's sole property.

Under said broad right, Lawrence was empowered to terminate the contract at any time and to convey or transfer the capital interest of himself and his brother, for such price and in such manner, and under such terms and conditions as though it were his own property, subject only to the obligation to account to and pay plaintiff for one-half of the value of the capital interest held by Lawrence in the Lawrence-Franzus partnership, as of

the date of October 31, 1947, and to account to and pay to plaintiff one-fourth (¼) of any earnings that may have been previously accumulated and unpaid, up to the date of October 31, 1947, the date on which the said termination of the said contract occurred, which was the date the partnership between Lawrence and Franzus was dissolved. It is clear that Lawrence was at all times ready, willing and able to account to and pay plaintiff the aforesaid one-half of the value of the said capital interest and one-fourth of the said earnings, but that at all times the plaintiff refused to accept the same and demanded that the obligation of Lawrence continue indefinitely. Moreover, the amount owing to plaintiff could not be ascertained until after an accounting was had; the amount therefore was unliquidated, and until ascertained no interest on said amount could be recovered against Lawrence.

The trial court properly adjudicated all of the rights, duties and obligations of the parties and it is respectfully submitted that its judgment should be affirmed.

Respectfully submitted,

Joseph C. Singer,
Attorney for Appellees.

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Edward I. Pollock,
By Edward I. Pollock,
Of Counsel.